BRIEF

In Support of Petition for Writ of Certiorari.

OPINION BELOW.

The opinion and decree of the Circuit Court of Appeals, Sixth Circuit (R. 41), was entered June 27, 1940, and the mandate issued July 29, 1940 (R. 49), affirming the decision of the United States Board of Tax Appeals, 37 B. T. A. 1335 (R. 31-32).

JURISDICTION.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (c. 229, 43 Stat. 936).

STATUTES AND REGULATIONS INVOLVED.

The applicable provisions of the statutes and regulations are set forth in the appendix, infra, p. 13.

STATEMENT.

The essential facts are stated in the foregoing petition for certiorari (pp. 2-3, supra) and in the interest of brevity are not repeated here. Any necessary elaboration of the evidence will be made in the course of the argument.

SPECIFICATION OF ERRORS.

The court below erred:

1. In disregarding the plain provisions of Section 303 (a) (3) of the Revenue Act of 1926, as amended, by failing to give the ordinary meaning thereto.

2. By holding that the nature and scope of the business of the legatee governed instead of the use of the legacy as willed by the testator.

3. By applying the rule of narrow construction instead of the rule of liberal construction.

4. In holding that the deduction of the bequest depended upon the cemetery association being organized and operated exclusively for charitable purposes.

5. It is in conflict with and contrary to the applicable decisions of this court, the Circuit Courts of Appeal and the Bureau rulings.

6. It is contrary to public policy.

ARGUMENT.

The bequest was to trustees for the life of Irene Dorner, then to the cemetery association, to be held by it as a fund for the upkeep of and additions and betterments to the cemetery. The stipulated value of the bequest to the cemetery association is involved and was deducted in the estate tax return and disallowed by the Commissioner of Internal Revenue. The disallowance thereof was affirmed by the Board of Tax Appeals and the court below.

The Commissioner, the Board of Tax Appeals and the court below failed to recognize that the terms of the will of the testator specifically restricting the use of the bequest to additions to and upkeep of the cemetery (R. 18) governed, and not the scope and nature of the business of the cemetery association (R. 43).

The court below erred (1) in disregarding the plain language of Section 303 (a) (3) of the Revenue Act of 1926, as amended, providing for the deduction of bequests to trustees to be used for charitable purposes; (2) in disregarding the applicable decisions of this court, other circuit courts, and rulings of the Commissioner, holding that the use specified in the will of the testator governed the right to the deduction of the bequest, that exemption provisions are to be construed liberally in the taxpayer's favor; (3) in disregarding the decision of this court holding that the gift of land for cemetery purposes was a dedication to public, pious and charitable use.

The plain purport of Section 303 (a) (3) of the Revenue Act of 1926, as amended, is to allow the deduction of bequests for public, religious, or charitable purposes. At least three tests are prescribed: (1) if the bequest is to a municipality the test is whether it is to be used for a public purpose; (2) if to a corporation or association, uncon-

ditionally, for general business purposes, the test is whether such corporation or association is organized and operated for religious or charitable purposes; (3) if the use is specified and controlled by the terms of the will of the testator, the test is whether such specified use is religious or charitable, and the nature of the general business of the legatee or trustee has no application or bearing. The court below and the Board of Tax Appeals erroneously applied (2) above. (3) above applies for the reason that under the terms of the will the Oak Grove Cemetery Association was bound to use the bequest for the upkeep of the cemetery and additions thereto.

The court below admits that a cemetery association could be so organized and operated as to be a charitable organization within the meaning of the Revenue Act, but disallows the deduction of the bequest on the grounds that the cemetery association was not organized and operated for exclusively charitable purposes because it did not give free burial rights and made charges for upkeep. That is contrary to the plain language of the above section 303 (a) (3), and the fact that the entire services, properties and income of the cemetery association were devoted to additions and betterments to and upkeep of the cemetery, and that through the county, city, churches and other organizations, free burial rights were given to the poor. The aforesaid section 303 was founded on the policy of encouraging the generosity of donors to charitable and altruistic objects. If the bequest had been to a bank or trust company specifically for the upkeep of the cemetery, one would scarcely contend that it was not for a charitable use.

The decision of the court below is in conflict with Young Men's Christian Association v. Davis, 264 U. S. 47, and Levey v. Smith, 103 Fed. (2d) 643 (C. C. A. 7), holding as follows:

"The right to a deduction depends upon what a testator has willed respecting the use of a legacy and not upon the use which a legatee is willing to make of it. It is the theory of the estate tax statute that the entire estate interest which passes at death is to be used as the basis of the estate tax except to the extent that the law allows deductions. The statute gives to a testator the power to reduce the interest which will be subject to the estate tax. In Young Men's Christian Assn. v. Davis, the Supreme Court stated the thought thus (264 U. S. 47, 50, 44 S. Ct. 291, 292, 68 L. Ed. 558):

" 'Congress was thus looking at the subject from the standpoint of the testator and not from the immediate point of view of the beneficiaries. It was intending to favor gifts for altruistic objects, not by specific exemption of those gifts, but by encouraging testators to make such gifts. Congress was in reality dealing with the testator before his death. It said to him, "If you will make such gifts, we will reduce your death duties and measure them, not by your whole estate, but by that amount, less what you give." ' "

It is contrary to the rule laid down in Helvering v. Bliss, 293 U. S. 144; U. S. v. Pleasants, 305 U. S. 357, and Roche's Beach, Inc., 96 Fed. (2d) 776, holding that exemption of gifts for altruistic purposes are begotten from motives of public policy, and are to be liberally construed in favor of the taxpayer.

It is contrary to the opinion of the General Counsel of the Bureau of Internal Revenue, No. 21,610, Internal Revenue Cumulative Bulletin, 1939-2, page 103, holding that the use specified in the will of the testator or other binding instrument governed, irrespective of whether the legatee was organized and operated for exclusively charitable purposes.

It is contrary to the ruling of the Commissioner of In-

ternal Revenue, I. T. 1256, Internal Revenue Cumulative Bulletin I-1, page 189, holding that a gift to a cemetery association, organized solely to lease and care for a cemetery owned by a city was for an exclusively public purpose.

It is contrary to Beattie and Ritchie v. Kurtz, 2 Pet. 566; City of Cincinnati v. Lessee of White, 6 Pet. 431, and Hopkins v. Grimshaw, 165 U. S. 342, holding that a gift for cemetery purposes is a dedication to a public, pious and charitable use. These decisions are within the judicial construction of a charity in Ould v. Washington Hospital, 95 U. S. 303; Bok v. McCaughn, 42 Fed. (2d) 616, and St. Louis Union Trust Co. v. Burnet, 59 Fed. (2d) 927, and also within the principles upon which is founded U. S. Code, Title 24, Sections 271-295, providing for the acquisition and upkeep of our national cemeteries with public funds.

The decision of the court below is contrary to public policy. Bequests for altruistic objects are encouraged by both the courts and by Congress (Young Men's Christian Association v. Davis, supra; Levey v. Smith, supra). Exemption of such bequests or gifts from taxation, either specifically or by deduction, is from motives of public policy (Helvering v. Bliss, supra, and U. S. v. Pleasants, supra).

CONCLUSION.

The decision of the court below involves the construction of a federal statute, and is so erroneous as to constitute a departure from the usual and accepted course of judicial procedure, and calls for an exercise of this court's power of supervision. It is contrary to the statute, decisions of this court, other Circuit Courts of Appeal, and rulings of the Bureau of Internal Revenue. The issue concerns a gift for

the benefit of the public. The question is of public importance. The petition should be granted.

Respectfully submitted,

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